

Respondent contends Judge Bogart erred by not including the 15 percent functional impairment rating provided by Dr. John G. Esch, Jr., in computing the extent of claimant's

permanent impairment. Respondent requests the Board to modify the Award and reduce claimant's permanent partial disability from a 35 percent to a 17.5 percent loss of use of the right leg.¹

Conversely, claimant contends Dr. Mills and Dr. Esch underestimated the impairment from claimant's deep vein thrombosis. Accordingly, claimant requests the Board to award him benefits for a 50 percent loss of use of the right leg.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified. As indicated below, the Board finds claimant has sustained a 28 percent loss of use of the right leg.

The accident is not disputed. Claimant fractured his right leg on May 3, 2002, when a steel beam struck his legs. Claimant received medical treatment from orthopedic surgeon Dr. John G. Esch, Jr., who operated on claimant's right leg to repair the fracture. Later, claimant underwent additional surgery to address the blood clots that had formed in his leg.

In late September 2002, after recovering from his surgeries, claimant returned to his job with respondent's highway department. According to claimant, despite wearing compression hose and taking anticoagulants daily, he continues to experience pain in his right knee and swelling in his right leg, which worsens as the day progresses.

The record includes the testimonies from three medical experts. Board-certified orthopedic surgeon Edward J. Prostic, M.D., examined claimant at claimant's attorney's request in October 2002. Dr. Prostic found significant swelling in claimant's right thigh and right calf and diagnosed mild arthritis in the knee, mild patellofemoral disease, and chronic edema of the leg from postphlebotic syndrome.

Using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.), Dr. Prostic rated claimant's injury as comprising a 50 percent permanent impairment to the right leg. In rating claimant's functional impairment, the doctor concluded claimant sustained a two percent impairment to the leg due to the tibial plateau fracture and between a 40 and 70 percent impairment to the leg due to the

¹ See K.S.A. 44-510d.

postphlebotic syndrome. Using Table 69 in the *Guides*, which addresses lower extremity impairment due to peripheral vascular disease, Dr. Prostin concluded claimant fell in Class 3 of that table as the doctor felt claimant had “marked edema that is only partially controlled by elastic supports.”²

Had Dr. Prostin determined that claimant only experienced swelling below the knee, the doctor would have rated claimant’s thrombosis as only a Class 2 impairment of the *Guides*’ Table 69.

The second medical expert, Dr. Philip R. Mills, who is board-certified in physical medicine and rehabilitation, examined claimant in early November 2003 at respondent’s request. Dr. Mills diagnosed claimant as having a cleavage-type fracture of the lateral tibial plateau of the right knee and a deep vein thrombosis with placement of a vena cava filter.

Dr. Mills also rated claimant using the *Guides* (4th ed.) and concluded claimant sustained a five percent impairment to the right leg due to the fracture and a 15 percent impairment to the leg due to the thrombosis, which the doctor combined and rounded to a 20 percent impairment to the leg. The doctor observed swelling in claimant’s right calf. But the doctor did not measure claimant’s right thigh. The doctor testified, in part:

Q. (Mr. Phalen) You observed that there is an increase in the right calf compared to the left?

A. (Dr. Mills) Yes.

Q. You found that compatible with a residual from the DVT, correct?

A. Yes.

Q. Did you measure the calf, Doctor? Did you measure the calf?

A. I heard the question.

Q. Sorry.

A. I was looking to see. I may not have because he told me it would change so much, I may have decided that it wouldn’t be that helpful.

Q. Did you make -- did you observe his thighs or were you focusing on the knee and the calf?

² Prostin Depo., Ex. 1 at 3.

A. I focused on the calf, but I did observe the thigh, but I don't recall what it suggested. I decided against measuring -- I always will measure the thigh circumference in a knee case unless there is something like a DVT, and then the guides would just toss the results out. So in his case, because he had the history, clear history of deep vein thrombosis, I did not measure the thigh circumference and compare it side to side.³

In rating claimant's thrombosis, Dr. Mills felt claimant's impairment was a Class 2 from the *Guides*' Table 69, which requires "persistent edema of a moderate degree, incompletely controlled by elastic supports."⁴ And, according to that table, a Class 2 impairment constitutes a 10 to 39 percent impairment to the lower extremity.

Had Dr. Mills determined that claimant had continuous marked edema in his leg, the doctor would have rated claimant's thrombosis as a more severe Class 3 impairment. Dr. Mills explained, in part:

Q. (Mr. Phalen) He described to you the swelling that would occur on a daily basis that you used the term markedly swelling in your report, true?

A. (Dr. Mills) That's correct. But that wasn't marked edema all the time. When I looked at him, he had persistent edema, it was of a moderate degree, and it was incompletely controlled, so therefore he would be a Class 2. However, had he come in and he always had marked edema, then that would be Class 3.

Q. Do you read marked edema under Class 3 of Exhibit 3, it has to be all the time?

A. Yes. Rather than persistent edema, which is also edema that's present all the time, but it's of a moderate degree. It may go, it may fluctuate, but it's not -- it's not always marked edema.

Q. Could you point somewhere in the guide where your interpretation of moderate and marked edema exist?

A. Just under Class 2, the definition as I read to it's persistent edema, that's what he had. His edema was not -- was not really marked when I saw him, but it was persistent.⁵

³ Mills Depo. at 19-20.

⁴ *Id.*, Ex. 3.

⁵ Mills Depo. at 22-23.

Finally, the third expert medical witness who testified was Dr. John G. Esch, Jr. Dr. Esch is the orthopedic surgeon who treated claimant's leg fracture. The doctor last saw claimant in October 2002 and noted claimant had residual and persistent swelling in his right leg. According to Dr. Esch, claimant sustained a five percent functional impairment to the right leg due to the tibial plateau fracture and a 10 percent functional impairment due to the deep vein thrombosis, which combined for a 15 percent functional impairment to the right leg. Dr. Esch also concluded claimant had a Class 2 impairment from the deep vein thrombosis. The doctor, however, also testified the *Guides* do not provide an objective basis for determining where an impairment rating falls within the ranges set forth for the different classes.

Judge Bogart averaged Dr. Prostic's 50 percent rating to the leg with Dr. Mills' 20 percent rating to the leg and, therefore, concluded claimant sustained a 35 percent functional impairment to his right leg. The Judge did not mention whether he considered Dr. Esch's opinion or, if so, why he did not utilize Dr. Esch's functional impairment rating in determining the extent of claimant's ultimate impairment.

After carefully considering the doctors' opinions, this Board is not convinced that any of the three ratings is any more persuasive than the others. Accordingly, the Board averages the three ratings and concludes claimant has sustained a 28 percent functional impairment to his right leg as a result of the May 3, 2002 accident. Consequently, the March 25, 2004 Award should be modified to grant claimant permanent disability benefits for a 28 percent loss of use of the right leg under the provisions of K.S.A. 44-510d(a)(16).

AWARD

WHEREFORE, the Board modifies the March 25, 2004 Award to grant claimant permanent disability benefits for a 28 percent loss of use of the right leg.

William W. Stapleton is granted compensation from Crawford County and its insurance carrier for a May 3, 2002 accident and resulting disability. Based upon an average weekly wage of \$498.75, Mr. Stapleton is entitled to receive 22 weeks of temporary total disability benefits at \$332.52 per week, or \$7,315.44, plus 49.84 weeks of permanent partial disability benefits at \$332.52 per week, or \$16,572.80, for a 28 percent permanent partial disability, making a total award of \$23,888.24, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority. The record establishes it is subjective whether an individual falls within Class 2 or Class 3 of the *Guides'* Table 69, which addresses peripheral vascular disease. Class 2 carries an impairment from 10 to 39 percent and Class 3 carries an impairment from 40 to 69 percent. Moreover, where an individual falls within those ranges of impairment is also highly subjective.

I believe claimant's functional impairment lies somewhere between Dr. Esch's 15 percent rating and Dr. Prostic's 50 percent rating. Accordingly, I would average those two ratings and grant claimant permanent disability benefits for a 33 percent disability to his right leg. By averaging all three ratings, the majority has given undue weight to the more conservative estimate of claimant's impairment.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director